(2)

91-127

No.

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

THOMAS E. STILES
Counsel of Record

Shaun F. Carroll
Nourse & Bowles
Attorneys for Respondent
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New York, New York 10006
(212) 952-6200

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. May summary judgment be granted in favor of a defendant shipowner in a Jones Act case where there is no evidence of a causal connection between the alleged negligence and the claimed injury?

2. In a maritime case tried to a jury, may the trial court add prejudgment interest to the jury verdict where there is evidence that the jury already took interest into consideration in its award?

LIST OF PARTIES

The parties to the proceedings below are as follows:

Plaintiffs Below

S.M. Pires and Virginia Pires, his wife.

Defendants Below

Frota Oceanica Brasileira S.A., Eduardo Lopēz as Executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as Executor for the Estate of James Byrne, Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston.

Parties to this Proceeding

Only Frota Oceanica Brasileira S.A. has been named as a respondent to this appeal. The following statement is provided in accordance with Rule 29.1 of the Rules of the Supreme Court of the United States.

Respondent Frota Oceanica Brasileira S.A.'s corporate parents and the subsidiaries which it directly or indirectly owns by less than one hundred percent are listed in Appendix C.

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No.

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OCTOBER TERM, 1991

S.M. PIRES and VIRGINIA PIRES, his wife,

Petitioners,

vs.

FROTA OCEANICA BRASILEIRA S.A.,

Respondent,

EDUARDO LOPEZ as Executor for the Estate of FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., J. DIXON BYRNE as Executor for the Estate of JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON,

Defendants.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION

OPINIONS BELOW

Frota Oceanica Brasileira, S.A. opposes certiorari to review the memorandum decision and order of the Supreme Court of the State of New York, Appellate Division, First

Department, officially reported at 161 A.D.2d 129, 554 N.Y.S. 2d 855 (1st Dept. 1990) which reversed the lower court. The opinion and order of the Appellate Division are reprinted in Petitioner's appendix at 1a and 22a respectively.

The decision and order of the lower court dated May 26, 1987, denying summary judgment, is reprinted in Petitioner's appendix at 34a.

COUNTER STATEMENT OF THE CASE

I. *Counter Statement of Facts*

Petitioner Pires was a Brazilian seaman working on board the FROTALESTE, a Brazilian flag ship owned and operated by Respondent, Frota Oceanica Brasileira, S.A. ("Frota"), a Brazilian corporation. On December 11, 1975, the FROTALESTE was docked at the Port of Galveston, Texas. Pires and three other shipmates were going into town at approximately 8:00 p.m. on a Sunday night to telephone their wives in Brazil and look at the Christmas lights in town. At about 8:15 p.m., while walking south on 37th Street, which bisected a railroad yard, Pires was struck by a railway hopper car, which was standing on and partially blocking 37th Street. The accident occurred as Pires was crossing the tracks when, suddenly and without warning, the railway car was caused to move backwards by a locomotive owned and operated by the Port of Galveston, which was engaged in the process of making up a train. As a result, Pires sustained severe and permanent injuries resulting in the amputation of his leg.

II. *Counter Statement of the Proceedings Below*

The Jones Act claim which is the subject of this petition is one of several causes of action in this case, some of which remain the subject of proceedings below, and all of which may

yet be reviewed by the New York State Court of Appeals. The history of the case, briefly, is as follows.

In November 1976, Pires commenced the subject action against Frota and other named defendants in New York State Supreme Court alleging a personal injury claim under 46 U.S.C. §688 (the "Jones Act") and the general maritime law of unseaworthiness.

In 1977, petitioner Pires moved for summary judgment on a claim for maintenance and cure, and the trial court ruled that such a claim was not stated or stateable on the facts plead. The parties then continued with a straight Jones Act case.

Petitioner's first notice of deposition was served on July 25, 1977. Respondent moved for a protective order on August 10, 1977 on the ground that the underlying claim was baseless.

Petitioner then did nothing in this case for four months, at which time they served a notice of deposition dated January 24, 1978. Respondent immediately moved to strike that notice on February 8, 1978 once again on the ground that since the claim was baseless on the merits, depositions of persons with no knowledge of the accident constituted harassment. Petitioner opposed that motion in papers dated February 22, 1978.

The trial court did nothing to resolve this motion for nine (9) years.

In the interim, Petitioner moved to strike Respondent's answer for failure to produce the witnesses by motion dated December 19, 1978. Respondent opposed by motion papers dated December 28, 1978.

Again, the trial court did nothing to decide this motion for nine (9) years.

In February 1983, Respondent Frota moved for summary judgment on the Jones Act claim and sought to strike the outstanding notices of deposition.

On September 22, 1986, the Petitioner filed a notice of trial for an unpleaded cause of action for maintenance and cure. Frota and the other defendants moved to strike the notice of trial. The court denied that motion and proceeded to trial.

The trial court decided the outstanding discovery motions by order dated May 26, 1987, nine years after the motions were filed, denying the motion to strike the pleadings and directing the defendants to produce the witnesses.

At the same time, the trial court also denied Frota's 3 1/2 year old motion for summary judgment on the Jones Act claim by order dated May 26, 1987.

Frota immediately appealed from the trial court's ruling on the Jones Act summary judgment motion.

In June 1987, the court conducted a jury trial on the issue of Frota's liability for maintenance and cure. In July 1987, the jury returned a verdict of $1,323,666.70 for the Petitioner.

On October 20, 1988, the court entered a judgment against Frota on the basic maintenance and cure claim, stating that the court was reserving several other issues relating to Jones Act and negligence liability, and also consequential damages from the so called failure to pay maintenance and cure. (Petitioner's Appendix at 6a).

Frota appealed from the maintenance and cure judgment on November 18, 1988.

Thereafter, in January 1989, the parties proceeded to trial on the issue of consequential damages which arose from the alleged failure to pay maintenance and cure. This trial resulted

in a jury verdict in plaintiff's favor awarding, *inter alia*, $24,000,000.00 in punitive damages. On February 21, 1989, Frota moved to set aside the punitive damage portion of the jury's verdict on the ground that such damages are not recoverable under *Vaughn v. Atkinson*, 369 U.S. 527 (1962). Frota's post trial motion has gone undecided for over two years at this point. As a consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

Frota's appeals from the order denying summary judgment on the Jones Act claim, and the maintenance and judgment were heard together by the New York State Supreme Court Appellate Division in January 1990. On May 1, 1990 the New York State Supreme Court Appellate Division, First Department issued an order and a memorandum decision reversing the decision below and summarily dismissing Pires' Jones Act claim against Frota and modifying and affirming the judgment in favor of Pires on his claim for maintenance and cure. (Petitioner's Appendix at 1a).

On May 8, 1990 Frota moved in the Appellate Division, First Department for leave to appeal to the New York Court of Appeals from the maintenance and cure judgment. Pires sought leave to appeal from the dismissal of the Jones Act claim.

On July 26, 1990 the Appellate Division denied Frota's motion for leave to appeal to the Court of Appeals in respect of the maintenance and cure claim. The same day, the Appellate Division denied Pires' motion for leave to appeal to the Court of Appeals in respect of the dismissal of the Jones Act claim.

By motion for leave to appeal filed with the Court of Appeals on August 2, 1990, Frota timely sought leave to appeal to the Court of Appeals from the maintenance and cure judgment and the order of the Appellate Division affirming that

judgment. Pires sought leave to appeal from the dismissal of the Jones Act claim.

By Order of November 27, 1990, the Court of Appeals denied Frota's motion for leave to appeal the maintenance and cure claim "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (Respondent's Appendix at A-1).

The same day, November 27, 1990, the Court of Appeals denied Pires' motion for leave to appeal from the Jones Act dismissal, again "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." (Petitioner's Appendix at 42a). Pires moved for reargument. The Court of Appeals denied Pires reargument by order dated March 21, 1991. (Petitioner's Appendix at 43a).

By Petition to this Court dated April 15, 1991, Frota sought a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division in respect of the maintenance and cure judgment.

By Order dated June 10, 1991, this Court denied Frota's petition for a Writ of Certiorari. (Respondent's Appendix at A-2).

By an undated Petition served on June 19, 1991, Pires now seeks a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department in respect of the order dismissing the Jones Act claim.

There is still no judgment entered as to the consequential damages, punitive damages and attorneys' fees in respect of the maintenance and cure claim in this case.

REASONS FOR DENYING THE WRIT

I. *This Appeal Is Not Ripe For Review By This Court.*

The Court should deny the Petition for a Writ on the ground that the order sought to be appealed from lacks finality. Petitioner seeks review of an order that has not yet been considered by the New York State Court of Appeals. 28 U.S.C. §1257 authorizes this Court to grant certiorari to hear "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." The decision of the New York State Appellate Division, First Department, an intermediate appeals court, is not a final order so long as review by the Court of Appeals is possible. *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469 (1975).

As the foregoing counterstatement of the proceedings below makes clear, the New York State Court of Appeals has, thus far, only declined to review the parts of the case brought to its attention, including the order dismissing the Jones Act claim, because the orders appealed from "do not finally determine the action." The New York State Court of Appeals, it appears, is waiting for all pending proceedings below to be resolved. It is certainly possible that the New York State Court of Appeals will review this case in its entirety as and when the trial court finally resolves the last claims pending before it, and the parties exhaust any related appeals at the Appellate Division level. Since the New York State Court of Appeals may yet deal with the federal issues raised in this petition, it appears that this Court should decline to issue a writ at this time in respect of the order dismissing the Jones Act claim.

Frota notes that this Court recently denied its Petition for a Writ of Certiorari to review an order of the New York State Appellate Division rendered in respect of the maintenance and cure claim in this action, which order had also not yet been reviewed by the New York Court of Appeals. Accordingly, it

seems that Pires' Petition for a Writ of Certiorari in respect of the Jones Act claim should properly be denied for the same reason.

At this point, it seems that the case should be reviewed as a whole by the New York State Court of Appeals before it is brought to this Court. The Court should deny the Petition for a Writ.

II. *The Decision Below Is Correct In All Respects.*

Pires argues that this Court should grant certiorari because the New York Appellate Division allegedly dismissed the Jones Act claim simply because the injury took place ashore. (Respondent's Petition at 4-7). Petitioner further argues that once it was established in a related proceeding that the Petitioner was in the vessel's service when injured, the Jones Act claim had to be submitted to the jury on the issue of causation and the Appellate Division erred in dismissing the case summarily. (Respondent's Petition at 22). Petitioner is incorrect on both points. The decision below did not turn solely on a finding that Pires was injured ashore, nor did the Appellate Division ignore that Pires may have been in the ship's service when injured.

In reversing the lower court's order, the Appellate Division assumed that Pires' factual allegations regarding the alleged unseaworthiness and negligence of the vessel owner were true for purposes of the appeal below. Even assuming those facts were true, the Appellate Division correctly found there was no merit to Pires' Jones Act claim.

For an injured seaman to recover under the Jones Act, he must prove three things:

(l) that he was a seaman;

(2) that he was injured in the course of his employment; and

(3) that the injury was caused by his employer's negligence.

Lindgren v. Tugboat Dalzellable, Inc., 26 N.Y.2d 455, 459-60, 259 N.E.2d 916, 311 N.Y.S.2d 495, 498 (1970); Norris, The Law of Seaman §30:31 (4th ed.).

The central issue in this case, and the focus of the Appellate Division's decision below, is causation. Petitioner's citations to *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959), *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943); *Nowery v. Smith*, 69 F. Supp. 755 (E.D.Pa. 1946), *aff'd*, 161 F.2d 732 (3rd Cir. 1947), are all inapposite. Those cases concern themselves with the second prong of a Jones Act claim listed above, and stand for the proposition that a seaman may be injured "in the service of the vessel" even though the injury takes place ashore. Those cases do not apply here because the Appellate Division did not dismiss the case simply because the Petitioner was injured off the vessel or was otherwise not in the ship's service. In this case, for purposes of the appeal only, it was and is assumed that the petitioner was "in the service of the ship" when injured. The decision below focuses on causation. Frota argued below that there was no evidence of negligence on their part which was causally connected to the accident, and the Appellate Division agreed. They found no evidence of breach of any duty of care owed by Frota to Pires, and even assuming the conditions complained of existed and amounted to a breach of duty, there was no showing that such conditions were a proximate cause of petitioner's injuries.

Petitioner's arguments with respect to their "feather weight" burden on causation miss the point of the Appellate

Division's decision. Though a seaman's burden of proof on the issue of causation may well be less than in a common law suit, it does exist. *Litherland v. Petrolane Offshore Constr. Services, Inc.*, 546 F.2d 129 (5th Cir. 1977) The point of the decision below is that "even judged by the liberal standards of the Jones Act," no jury could reasonably find a causal connection between Petitioner's allegations of negligence on board the ship and Pires' injury. *Pires v. Frota Oceanica Brasileira, S.A., et al.*, 161 A.D. 129; 554 N.Y.S.2d 855 (1st Dept. 1990). The Petitioner was injured by a train negligently operated by Galveston Wharves on a public highway, blocks from the ship. Whatever Frota allegedly did or did not do on the ship, it did not cause the injury for which Petitioner has claimed. That injury was caused by the negligent act or acts of Galveston Wharves. The acts of Galveston Wharves "were of such an extraordinary nature or so attenuates defendant's [conduct] from the ultimate injury that responsibility ... may not be reasonably attributed to the defendant." *Ordonez v. Long Island Railroad Company,* 112 A.D.2d 923, 492 N.Y.S.2d 442, 443 (1985) (*quoting Kush v. City of Buffalo,* 59 N.Y.2d 26, 33, 449 N.E.2d 725, 462 N.Y.S.2d 831, (1983)).

The Court should deny the Petition for a Writ because the decision below is correct in all respects.

III. *The Dismissal Of The Lower Court's Award Of Pre-Judgment Interest Was Proper*

As to the award of prejudgment interest stricken by the Appellate Division, it should first be noted that Petitioner here seeks to appeal from an order of the Appellate Division separate from the order which dismissed the Jones Act claim. The award of prejudgment interest occurred in connection with the judgment in Petitioner's favor on his maintenance and cure claim, not the Jones Act claim. The maintenance and cure claim was tried solely to a jury. No issues were reserved to the court.

In these circumstances, the rule is that the court may not add prejudgment interest to the award of the jury, which sat as trier of fact. *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981). *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir.) (Judicial supplement of prejudgment interest to maintenance and cure jury award stricken on appeal.) This is consistent with the general rule in federal law forbidding judicial awards of prejudgment interest in cases tried to a jury unless it is very clear the jury did not consider interest in its deliberations. *Middle E. Eng. Dev. v. Arkwright-Boston Mfrs.*, 675 F. Supp. 855 (S.D.N.Y. 1987). In this case, the jury verdict indicates that they did allow for interest. The jury verdict for past maintenance and cure is for an amount *greater* than that testified to by petitioner's expert at trial. *See, Maintenance & Cure Record on Appeal,* Vol. II, p.1380-81; 6182-85; 2025. The only fair conclusion is that this extra sum represents an allowance for interest. The Appellate Division properly struck the supplemental award of prejudgment interest by the trial court.

Though it is not clear that Jones Act cases necessarily govern awards of prejudgment interest in a maintenance and cure case, Frota notes that Petitioner incorrectly contends that *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988) overrules *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) on the issue of the propriety of prejudgment interest in a Jones Act case. In fact, *Snyder* reinforces *Morales* when it restates the general rule in Jones Act cases:

> "if a seaman's personal injury claim under the Jones Act is tried at law, "he can have a jury but must forego prejudgment interest; if he elects to proceed in admiralty, he can have prejudgment interest but no jury."

Snyder v. Whittaker Corp., 839 F.2d 1085, 1094 (5th Cir. 1988).

If in *Snyder* prejudgment interest was added by the court after the jury verdict, as it was, it was because *Snyder* involved a claim under the Death on the High Seas Act (DOSHA) and the Court expressly refused to follow the acknowledged rule in Jones Act cases. The rule is that prejudgment interest is not added to a jury verdict in a Jones Act case.

Petitioner also relies on *Stissi v. Interstate and Ocean Transport Co.*, 590 F. Supp. 1043, 1049 (E.D.N.Y. 1984) for the position that the law in the Second Circuit is that a court may add prejudgment interest to a jury award. *Stissi* is distinguished in the more recent Second Circuit case, *Middle E. Eng. & Dev. v. Arkwright-Boston Mfrs.*, 675 F. Supp. 855, 858 (S.D.N.Y. 1987) which restates the rule "that a judge generally may not add prejudgment interest to a jury award of damages." Id. at 858. *Middle E. Eng. & Dev.* distinguished *Stissi* as a case where there was no danger of a jury's having already compensated a petitioner for delay in his receiving his award. Id at 858. Again, the facts in this case indicate that the jury awarded prejudgment interest for all past due sums. Therefore, the trial court was without authority to add interest after the verdict.

The Court should deny the Petition for a Writ because the court below properly struck the trial court's supplemental award of prejudgment interest.

CONCLUSION

For the foregoing reasons, the Court should decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

THOMAS E. STILES
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New York, New York 10006
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Dated: New York, New York
July 19, 1991

APPENDIX

APPENDIX A

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A.D.1990

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-14 Mo. No. 903

S.M. Pires and Virginia Pires, his wife,

Respondents,

v.

Frota Oceanica Brasileira, S.A.,

Appellant,

et al.,

Defendants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

/s/Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 10, 1991

Mr. Thomas E. Stiles
Nourse & Bowles
One Exchange Plaza at 55 Bdwy.
New York, NY 10006

Re: Frota Oceanica Brasileira, S.A.
v. Starkheiser DaSilva Matos Pires
No. 90-1582

Dear Mr. Stiles:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,
/s/ William K. Suter
William K. Suter, Clerk

APPENDIX C

LIST OF PARENTS AND DIRECT AND INDIRECT SUBSIDIARIES

Frota Amazonica, S.A.
Cirne, Cia Industrial Do Rio Grande Do Norte
Salmac; Comercio; Industria, Exportacao E Importacao S/A
Afrofrota Taxi Aereo Limitada
C.B.A. Cia Brasileira De Aquicultura
S/A Salineira Do Nordeste - Sosal
Fragoso Pires Comercio E Industria S/A
Cia de Participacoes E Empreendimentos Cope
Seguradora Oceanica S.A.
Banco Vega S.A.
Equisul Transportes Ltda.
Tersal - Terminal Salineiro De Aroja Branca S.A.
Codfbra Ltda.
Sabrena, Soc de Reparos Navais Ltda.
Azevedo Bento S.A. Comercio E Industria
Vega S/A Corretora De Valores
Pamar, Participacoes Maritimas
J.C. Pires and Filhos Participacoes, S/A